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No. 08-441

IN THE
Supreme Court of the United States

JACK GROSS,
Petitioner,
v.
FBL FINANCIAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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March 4, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB").[1] NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 member businesses nationwide. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses nationwide.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and other federal and state employment non-discrimination laws. As potential defendants to claims of discrimination under the ADEA, *amici*'s members have a direct and ongoing interest in the issue presented before this Court concerning what evidentiary standards and burdens of proof should apply in a non-Title VII disparate treatment discrimination case.

SUMMARY OF ARGUMENT

This case does not require the Court to break new ground. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court was called upon to interpret the "because of" language of Title VII, which is identical to the language of the ADEA at issue in this case. It held, through Justice O'Connor's controlling concurrence, that where a plaintiff can present direct evidence that an illegitimate factor played a substantial role in the alleged adverse employment action, the burden of

persuasion can be shifted to the employer to prove that it would have taken the same adverse employment action without consideration of the impermissible factor. This decision continues to govern actions under the ADEA.

The ADEA's language and design are clear: an employer is prohibited from discriminating against an employee "because of" the employee's age. By any dictionary or common understanding of this phrase, along with statements made by this Court in its interpretation of the ADEA, the employee's age must be the but-for cause of the alleged adverse employment action. As such, in the absence of statutory language to the contrary, the plaintiff bears the burden to prove this essential element of liability. The "mixed motive" instruction departs from this requirement. The established direct evidence prerequisite serves a crucial gate-keeping function and has pragmatic value as the minimum protections needed by an employer before that employer is forced to bear a burden of persuasion not placed upon it by Congress or the well-settled civil litigation default rules against which Congress legislates.

The Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), despite protests to the contrary from Petitioner and his *amici*, has no bearing on the outcome of this case. The decisive statutory amendments made to Title VII by the Civil Rights Act of 1991, which were at issue in *Costa*, are tellingly absent from the ADEA, despite Congress' consideration of the ADEA in those amendments and decision to amend another portion of that statute, which is not relevant for the purposes of this appeal. As a result, as this Court has explicitly recognized,

the pre-1991 interpretation of Title VII's identical language continues to govern the ADEA.

At a minimum, this Court should affirm its holding in *Price Waterhouse*. If, however, the Court chooses to revisit that holding, it would better serve Congressional intent to abandon the *Price Waterhouse* approach and reinstate the more familiar and seminal framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and their progeny to govern all disparate treatment claims under the ADEA. This approach is well suited to address multiple motive cases and provides clear and easily applied direction to lower courts. Most importantly, this approach is faithful to the statutory language of the ADEA and civil litigation default rules by keeping the burden of proof on the essential liability issue of causation where it properly belongs: on the plaintiff.

ARGUMENT

I. THE COURT'S PRECEDENT IN *PRICE WATERHOUSE* REQUIRES A PLAINTIFF TO PRESENT DIRECT EVIDENCE THAT AGE PLAYED A SUBSTANTIAL ROLE IN A PARTICULAR EMPLOYMENT DECISION BEFORE SHIFTING THE BURDEN OF PERSUASION TO THE DEFENDANT IN AN ADEA SUIT.

The present case does not require this Court to plant new roots. Rather, it only requires the Court to reinforce previously planted roots. While on the

surface this case presents the question of whether a plaintiff must present direct evidence to obtain a "mixed motive" instruction in a case brought under the ADEA, this case, at its core, goes to the burdens of proof that each party must bear in that litigation. The "mixed motive" instruction, erroneously given by the district court in this case, actually shifts the burden of persuasion to the defendant on the critical liability issue of causation, a necessary element of any successful disparate treatment case under the ADEA.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court addressed "the respective burdens of proof of a defendant and plaintiff" in a Title VII suit prior to Title VII's amendment by the Civil Rights Act of 1991.[2] The result was several different opinions, none of which garnered majority support. Following this Court's directive to look to the position taken by the justice concurring on the narrowest grounds to discern the holding of such a case, the holding of *Price Waterhouse*, as applied to the ADEA, is clear: an employee must present direct evidence that age played a substantial role in a particular employment decision to shift the burden of persuasion to the employer in an ADEA suit via a "mixed motive" instruction.

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[2] *Price Waterhouse* was a sex discrimination case brought under Title VII, but it is equally applicable to the ADEA. In *Price Waterhouse*, the Court was interpreting the statutory language of Title VII, unaffected by the Civil Rights Act of 1991, which prohibits discrimination "because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C. § 2000e-2(a). The ADEA uses the identical prohibitory language, prohibiting discrimination "because of such individual's age." *See* 29 U.S.C. § 623(a).

A. Justice O'Connor's Concurring Opinion is the Holding of the Court in *Price Waterhouse*.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as reaffirmed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a unanimous Court established a "careful framework," *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring), governing evidentiary proof in disparate treatment discrimination cases. Under *McDonnell Douglas*, *Burdine*, and their progeny, the plaintiff's burden is to establish a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. Once the plaintiff has met this burden, the burden of production, but not persuasion, shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *See Burdine*, 450 U.S. at 253-55. To establish liability on the ultimate question of whether the defendant intentionally discriminated against the plaintiff, the plaintiff must then prove that the articulated reasons are pretextual or otherwise unworthy of credence. *See McDonnell Douglas*, 411 U.S. at 805. The *Burdine* Court was careful to emphasize that the burden of persuasion as to liability always remains with the plaintiff. That is, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

All of the *Price Waterhouse* opinions agreed as to the continuing validity of the *McDonnell Douglas*–

Burdine framework.[3] *See Price Waterhouse*, 490 U.S. at 245-47 (plurality opinion), 260 (White, J., concurring), 261-62 (O'Connor, J., concurring), 270 (Kennedy, J., dissenting). The plurality and concurring opinions, however, believed that in certain cases, termed "mixed motive" cases, the burden of persuasion could shift from the plaintiff to the defendant. The plurality would require that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[4] *Id.* at 244-45 (plurality opinion) (footnote omitted). The plurality opinion does not expressly adopt a specific evidentiary standard but states that

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[3] In fact, the dissent, authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Scalia, took the view that continued adherence to this framework was appropriate in all disparate treatment employment discrimination cases. *See Price Waterhouse*, 490 U.S. at 279, 286-293 (Kennedy, J., dissenting). As discussed in Part III, *infra*, *amici* believe that this approach is most in keeping with the statutory language of the ADEA and traditional norms of civil litigation.

[4] All of the Justices in *Price Waterhouse* agreed that if the defendant established that it would have made the same decision even if the impermissible factor did not play a role, the defendant would have no liability. The Civil Rights Act of 1991 did not alter this conclusion in the ADEA context. *See infra* Part II.A. Regardless of the Court's holding as to placement of the burdens of proof, it should continue to follow this holding of *Price Waterhouse*.

its standard is not "meaningfully different" than Justice O'Connor's approach. *Id.* at 250 n.13.

Recognizing the plurality's departure from the *McDonnell Douglas–Burdine* framework and noting the "strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation" resulting from the "mixed motive" instruction, Justice O'Connor found that a "mixed motive" instruction should only be given in disparate treatment cases "where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision."[5] *Id.* at 275 (O'Connor, J., concurring).

This Court's jurisprudence instructs that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); *accord City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (describing

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[5] Justice White also filed a concurring opinion, arguing that the Court should apply its precedent in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which involved the First Amendment rather than interpretation of a Congressional statute. *Price Waterhouse*, 490 U.S. at 258-59 (White, J., concurring). Justice White agreed with Justice O'Connor in part that the "mixed motive" instruction is available to plaintiffs who show that the unlawful motive was a substantial factor in the adverse employment action. *Id.* at 259.

the directive of *Marks* as "settled jurisprudence"). Justice O' Connor's concurrence fits this description.

The plurality, Justice White, and Justice O'Connor concurred in the judgment and believed that the burden of persuasion could shift to an employer to disprove but-for causation under certain circumstances. Justice O'Connor, by adding the requirement of direct evidence and thus further limiting the applicability of the Court's holding, "'concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. at 193 (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).[6]

Even Justice Kennedy's dissenting opinion in *Price Waterhouse*, which was joined by Chief Justice Rehnquist and Justice Scalia, recognized that Justice O'Connor's concurrence was the holding of the Court:

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6 In his brief, Petitioner Gross attempts to shed the direct evidence requirement of *Price Waterhouse* by arguing that Justice O'Connor's vote was "not necessary to produce a majority, and thus does not play a role in ascertaining the holding of the Court." *See* Brief for Petitioner at 54. This mathematical analysis misses the point. Justice O'Connor's opinion is the holding of the Court because it explicitly discusses the prerequisite of direct evidence to shift the burden of persuasion to the defendant and is thus the "narrowest ground" supporting the judgment where no rationale enjoys a majority, in accordance with *Marks*. Nowhere in the plurality opinion or concurring opinion of Justice White is the requirement of direct evidence discussed. Indeed, the plurality stated that its standard is not "meaningfully different" than Justice O'Connor's approach, *Price Waterhouse*, 490 U.S. at 250 n.13, and Justice White sought to follow *Mt. Healthy*, a case which itself involved direct evidence.

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.

Price Waterhouse, 490 U.S. at 280 (Kennedy, J., dissenting).[7]

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7 Justice O'Connor also viewed her *Price Waterhouse* concurrence as the holding of the Court in that case. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring) ("[P]rior to the Civil Rights Act of 1991, the evidentiary rule we developed to shift the burden of persuasion in mixed-motive cases was appropriately applied only where a disparate treatment plaintiff 'demonstrated by direct evidence that an illegitimate factor played a substantial role' in an adverse employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'CONNOR, J., concurring in judgment).").

Furthermore, the majority of the federal appeals courts have treated Justice O'Connor's concurring opinion as the holding of the Court and continue to apply this holding to disparate treatment cases brought under the ADEA. *See, e.g.*, *King v. United States*, 553 F.3d 1156, 1160 (8th Cir. 2009) ("Where the plaintiff presents

As a result, the Court need simply follow existing precedent in *Price Waterhouse* that an employee must present direct evidence of discrimination to obtain a "mixed motive" instruction, thus shifting the burden of persuasion to the defendant.

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direct evidence of discrimination, the court analyzes her claim under the mixed-motives framework established in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278-79, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring)."); *Scott v. Potter*, 182 F. App'x 521, 525 (6th Cir. 2006); *Mereish v. Walker*, 359 F.3d 330, 339-40 (4th Cir. 2004) (reciting Justice O'Connor's concurring opinion as the standard for the "mixed motive" framework in ADEA claims and suggesting, without deciding, that this standard continues to govern ADEA claims following passage of the Civil Rights Act of 1991); *Vesprini v. Shaw Contract Flooring Servs., Inc.*, 315 F.3d 37, 41 (1st Cir. 2002) ("As Vesprini adduced no competent 'direct evidence' of Shaw's age-based animus, however, he failed to generate any trialworthy issue of fact enabling him to invoke the *Price Waterhouse* paradigm."); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 337 & n.2 (3d Cir. 2002) (noting that an ADEA plaintiff can meet his burden of proof by "presenting direct evidence of discrimination that meets the requirements of Justice O'Connor's controlling opinion in *Price Waterhouse*"); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1402-03 (7th Cir. 1996).

Even the United States acknowledged that Justice O'Connor's concurrence was the holding of the *Price Waterhouse* court and argued, in its amicus brief submitted during the Court's consideration of *Desert Palace*, that it should continue to be followed. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 10-16, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

B. The Court's Holding in *Price Waterhouse*, through Justice O'Connor's Concurring Opinion, has Pragmatic Value as the Minimum Protection Required Prior to Forcing Employers to Disprove that an Employment Action was Taken "because of" Age.

Price Waterhouse takes the drastic step of shifting the burden of persuasion to the defendant on the critical liability issue of causation. This is done absent Congressional direction and in contravention of both the default civil procedure rules under which the plaintiff bears the burden of persuasion to prove liability and this Court's pronouncement in *Burdine* that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. Justice O'Connor took great pains to ensure that this "strong medicine" was administered fairly. *See Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). Requiring the plaintiff to present direct evidence, as a precondition to ridding himself of having to prove causation, is the minimum protection required prior to forcing a defendant to disprove that an employment action was taken "because of" age.

1. The ADEA requires but-for causation.

The plain language of the ADEA requires that a plaintiff alleging disparate treatment age

discrimination establish but-for causation. *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("[A] disparate treatment [age] claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."); *see also Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (quoting and emphasizing *Hazen Paper Co.* for the same proposition); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (*citing Hazen Paper Co.* for the same proposition). The ADEA provides, in part, that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a) (emphasis added).

The phrase "because of" is not defined in the statute. As a result, the Court looks to the language's ordinary meaning for its interpretation. *See, e.g.*, *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846, 850 (2009).

Both before and after the enactment of the ADEA, "because of" has been consistently defined as "by reason of" or "on account of," suggesting a direct cause and effect relationship, or but-for causation. *E.g.*, *American Heritage College Dictionary* 121 (3d ed. 2000) (defining "because of" as "by reason of" or "on account of"); *The American Heritage Dictionary of the English Language* 163 (3d ed. 1992) (same); *Webster's Ninth New Collegiate Dictionary* 139 (1988) (same); *The Compact Edition of the Oxford English Dictionary* 746 (1971) (same); *Webster's New International Dictionary of the English Language*

242 (2d ed. 1947) (same). This comports with everyday usage of the phrase. When individuals speak of one action occurring "because of" another action, a direct cause and effect relationship is presumed.

One would not say that Action B occurred because of Action A unless Action A was a determinative cause of Action B. *See Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").[8] As

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[8] The question of whether the phrase "because of" required but-for causation was a subject of discussion in *Price Waterhouse*. Justice O'Connor, in her concurring opinion, and Chief Justice Rehnquist and Justices Kennedy and Scalia in dissent held that a but-for causal relationship was clearly required, *see Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring) ("The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."), 281-82 (Kennedy, J., dissenting) ("Congress could not have chosen a clearer way to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue."). These Justices also agreed that the burden of proving but-for causation remained on the plaintiff, except that Justice O'Connor would permit the burden to shift to the defendant in the face of direct evidence establishing that an illegitimate factor played a substantial role in the adverse employment action. *Id.* at 270 (O'Connor, J., concurring); 286-90 (Kennedy, J., dissenting). Justice White expressly declined to decide whether but-for causation was required. *See id.* at 259 (White, J., concurring). As correctly noted by the dissent, although the plurality stated that but-for

a result, the statutory language of the ADEA clearly and unambiguously requires but-for causation and must be given effect. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citations omitted) (noting that the starting point for analysis is the statutory text and that the judicial inquiry is complete where that text is unambiguous).

But-for causation is a critical element of ADEA liability. If a supervisor's consideration of a person's age (Action A in the previous example) did not result in that person's termination (Action B in the previous example), it cannot be said that an ADEA violation occurred. The person was not terminated "because of," "by reason of," or "on account of" his or her age. Failure to so hold would dramatically transform and expand the ADEA into legislation aimed at punishing disagreeable thoughts rather than remedying illegal actions.

2. The "mixed motive" instruction impermissibly shifts an essential ADEA liability element to the defendant.

The text of the ADEA is silent as to which party should bear the burden of persuasion as to the critical causation element of liability. As a result, it

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causation was not required, *id.* at 239-42 (plurality opinion), its conclusion that the defendant could avoid liability by showing that it would have made the same decision absent consideration of the impermissible factor shows that its interpretation actually requires but-for causation. *See id.* at 283 (Kennedy, J., dissenting).

can be presumed that Congress legislated against the backdrop of the well-entrenched principle that the plaintiff bears the burden of proving each element of liability, including the causation element. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 56 (2005) ("When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA [Individuals with Disabilities Education Act] is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."). Congress has given no indication that it intended a contrary result. [9] *See id.* at 57-58 ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.").

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[9] While espousing the virtues of civil litigation defaults, Petitioner resorts to a legal sleight-of-hand to reach the outcome he seeks. He argues that this shift in burden of persuasion is appropriate because the employer has already been shown to be a wrongdoer. *See* Brief for Petitioner at 50-51. This is simply inaccurate. The employer has not been shown to be a wrongdoer because but-for causation, the very burden that Petitioner and his *amici* seek to cast upon defendants, has not yet been established. The ironic result is that the norms of civil litigation that Petitioner so rightfully espouses would be turned on their proverbial heads if Petitioner and his *amici* have their way.

3. Equity requires that the defendant not bear the burden of proof on an essential ADEA liability element until, at a minimum, the plaintiff has put forth direct evidence of age discrimination.

Petitioner's and his *amici*'s preference to shift the burden of persuasion to the defendant to disprove but-for causation is not surprising. It relieves him and other plaintiffs in disparate treatment age cases from having to prove a critical element of liability. The Court's holding in *Price Waterhouse*, through Justice O'Connor's concurring opinion, recognized this danger. Requiring direct evidence as a prerequisite to shifting the burden of persuasion is a pragmatic approach aimed at limiting the judicially created shift in burden of persuasion to those cases most likely to reflect unlawful discrimination. Among the pragmatic benefits achieved by adhering to this careful balance are: protecting the rights of employers and employees, providing a clear and workable rule to be applied by lower courts, conserving judicial resources, and guarding against liability based not on age but on factors often correlated with age.

Our American economic system is premised on the freedom of employers to direct and manage their businesses. This is reflected throughout the law, from our strong traditions of at-will employment, *see, e.g.*, *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972) (noting "common-law rule" that "employment is terminable by either party at will"), to the unwillingness of courts to substitute their

judgment for that of an employer on business decisions, *see, e.g., Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination."). On the other hand, employees have the right to not be judged on immutable characteristics such as age. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (*quoting W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985)).

The ADEA was meant to protect this balance of interests by barring employers from taking action against an employee on account of the employee's age, while simultaneously preserving the employer's wide latitude to run its business free from interference. Requiring the employer to disprove discrimination drastically alters this balance.[10] Prior to casting this enormous burden on an employer, it is appropriate that an employee asserting disparate

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[10] Furthermore, shifting the burden to a defendant can greatly increase the likelihood that a defendant will be penalized for making legitimate business decisions but communicating or executing those decisions in a less-than-perfect manner. Even human resource professionals at large corporations such as Respondent are not infallible and may occasionally handle communications with an employee with less thoughtfulness or foresight than preferable. While *amici* do not condone such behavior, such behavior does not automatically equate to discrimination. Requiring direct evidence to shift the burden of persuasion will help avoid liability for nondiscriminatory behavior.

treatment age discrimination provide direct evidence (rendering the need to make error-prone inferential leaps in logic unnecessary) that age did in fact cause the challenged employment action. This ensures that the standard litigation norm that a plaintiff must bear the burden of proof on the elements essential to his or her claim is set aside only in a limited number of cases that are more likely to be infected with discrimination.[11]

Requiring direct evidence prior to shifting the burden of persuasion on the critical liability element of causation also provides a bright-line and workable rule to be followed by lower courts struggling to determine whether to analyze a case or instruct a jury in accordance with the standard *McDonnell Douglas–Burdine* framework or more employee-friendly *Price Waterhouse* approach.[12] It will also

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11 In its *Desert Palace amicus* brief, the United States made this same point in urging the Court to continue to adhere to the direct evidence requirement of *Price Waterhouse* in Title VII. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 10, 29, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

12 As even Petitioner and his *amici* recognize, eliminating the crucial gate-keeping function served by the direct evidence requirement would nullify any distinction between those cases to be governed by the *McDonnell Douglas–Burdine* framework and those that would receive the causal boost of the "mixed motive" instruction. Instead of following the well-traveled path of *McDonnell Douglas*, *Burdine*, and their progeny, however, Petitioner and his *amici* would opt for the "mixed motive" instruction, thus shifting the burden of persuasion on causation to the defendant in all cases that proceed to trial. This is directly contrary to one point on which all Justices in *Price Waterhouse* agreed,

provide greater certainty to litigants and conserve judicial resources. Failure to provide a workable directive to lower courts will only sow confusion, increasing the number of appeals. [13]

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namely that the "mixed motive" instruction was not meant to replace the *McDonnell Douglas* line of cases. *See supra* Part I.A. As articulated in Part III, *infra*, *amici* urge the Court to decline this invitation and find that the *McDonnell Douglas–Burdine* framework should govern all disparate treatment age claims. Short of reinstating the *McDonnell Douglas–Burdine* framework to govern all disparate treatment age claims or adhering to the direct evidence requirement of *Price Waterhouse*, the Court must make clear that any "mixed motive" instruction must be reserved exclusively for those limited number of cases in which the trial court determines that no reasonable fact finder could conclude that age was not a substantial factor in the challenged employment action. The "mixed motive" instruction should not be allowed to replace *McDonnell Douglas*, thereby effectively shifting the burden of persuasion to employers in all ADEA cases.

[13] Petitioner and his *amici* spend much time attempting to demonstrate how lower courts have struggled to determine what constitutes direct evidence sufficient to trigger the *Price Waterhouse* "mixed motive" instruction. *See, e.g.*, Brief for Petitioner at 33-42. Even if this difficulty did exist, it does not justify throwing the baby out with the bathwater. It simply argues for further guidance from this Court as to what constitutes sufficient direct evidence. Furthermore, eliminating the direct evidence requirement would exacerbate rather than assuage the concern of Petitioner and his *amici*. Courts would not only have to look to the quality of evidence but would become bogged down in the more problematic and error-prone inquiry as to whether the quantity of circumstantial evidence is enough to cross an elusive threshold necessary to trigger a "mixed motive" instruction. This will only

This heightened evidentiary burden, in addition to providing clarity, is particularly appropriate for age discrimination cases. Age, unlike other protected characteristics such as race or sex, is often correlated with perfectly legitimate, nondiscriminatory factors such as years of service and pay rate. *See Hazen Paper Co.*, 507 U.S. at 608 (noting that pension status and seniority are correlated with age). Requiring direct evidence to shift the burden of persuasion to the employer helps to ensure that age, rather than a correlate of age, is actually the determinative factor behind the employer's action. *See Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004) ("And maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non-discriminatory employment decisions.").

But-for causation is a critical liability element to be proved by a plaintiff asserting disparate treatment age discrimination. If the Court is to shift this burden of persuasion to the defendant, the Court should require the plaintiff at least to present direct evidence of such discrimination to ensure that defendants receive the minimum level of protection equitably required prior to being saddled with this heavy burden. Short of adhering to this direct evidence prerequisite or reinstating the *McDonnell Douglas–Burdine* framework to govern all disparate treatment age claims, as urged in Part III, *infra*, the Court must make clear that any "mixed motive"

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intensify the practical problems solved by the requirement of direct evidence.

instruction is to be reserved exclusively for those limited number of cases in which the trial court determines that no reasonable fact finder could conclude that age was not a substantial factor in the challenged employment action.[14]

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[14] Petitioner and his *amici* make a number of arguments in support of shifting the burden of persuasion on causation to defendants, each of which is unavailing. Petitioner's *amici* argue, for example, that "[b]ecause direct evidence is extremely rare, most plaintiffs will be unable to obtain a mixed-motive instruction." *See* Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, et al. in Support of Petitioner at 23. This argument, even if true, misses the point. It starts from the incorrect assumption that plaintiffs in ADEA disparate treatment cases are *entitled* to the "mixed motive" instruction as a matter of course, despite the utter silence from Congress of its intention to alter the standard civil rule that plaintiffs bear the burden of persuasion on all liability elements critical to their claim. If Congress had wanted to alter this standard civil rule, which is precisely the result of the "mixed motive" instruction, it could have clearly said so, as it did in amending Title VII. *See infra* Part II.A. The "mixed motive" instruction should be reserved for those cases where discrimination may be especially likely.

The National Employment Lawyers Association makes a similar evidentiary argument in its *amicus* brief, arguing that "[a]n employee age 40 or over, under the general admissibility standards of Fed. R. Evid 401 and 402, ought to be able to introduce any evidence that makes it more likely than not that the mistreatment alleged was 'because of' age." Brief of National Employment Lawyers Association as *Amicus Curiae* in Support of Petitioner at 13. This is surely correct but again misses the point. The harm flowing from the "mixed motive" instruction is that it relieves the employee from having to prove that the "mistreatment

II. THE COURT'S DECISION IN *DESERT PALACE, INC. V. COSTA* HAS NO BEARING ON THIS CASE.

A. The Court's Decision in *Desert Palace v. Costa* was a Direct Result and Application of Statutory Amendments Made Only to Title VII, and Not the ADEA, by the Civil Rights Act of 1991.

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court was called upon to examine Title VII, as that statute was amended by the Civil Rights Act of 1991. It held that direct evidence is not

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alleged was 'because of' age," instead requiring the employer to disprove that the "mistreatment alleged was 'because of' age" once the employee shows that age may have been considered. The requirement of direct evidence serves the crucial gate-keeping function of preventing this exception from swallowing the rule.

There is every reason to believe that plaintiffs will have access to, and be able to present, any relevant evidence that exists to meet a burden of persuasion on causation. Any arguments that it is more equitable to shift the burden of persuasion to the employer to disprove but-for causation because of superior access to evidence is not only irrelevant given the statutory text but factually questionable. "[T]he suggestion that the employer should bear the burden of persuasion due to superior access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files." *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) (*citing Burdine*, 450 U.S. at 258). This is equally true in the ADEA context.

required to obtain a "mixed motive" instruction in disparate treatment claims brought under Title VII, as amended by the Civil Rights Act of 1991. In so holding, the Court correctly saw no need to decide whether Justice O'Connor's concurring opinion is the holding of *Price Waterhouse*, since that holding could no longer be applied to Title VII in light of the subsequent amendments to Title VII in the Civil Rights Act of 1991.

The but-for causal connection required by the "because of" language in Title VII was modified by two dispositive amendments in the Civil Rights Act of 1991, which amendments were not made to the ADEA. Specifically, pursuant to the Civil Rights Act of 1991, Title VII now provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor for any employment practice, even though other factors also motivated the practice.*" 42 U.S.C. § 2000e-2(m) (emphasis added). Coupled with this change is 42 U.S.C. § 2000e-5(g)(2)(B), which limits the remedies that can be imposed on a defendant "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor."

The practical effects of these amendments are twofold: (1) the but-for causation standard of Title VII is replaced with "a motivating factor" standard, "even though other factors also motivated" the adverse employment action, and (2) once this reduced causal burden is met by the plaintiff, the burden shifts to the defendant *by statute* to show

that the same action would have been taken absent the impermissible motivating factor. Perhaps most importantly, Congress defined the term "demonstrates" to mean "meets the burdens of production and persuasion," 42 U.S.C. § 2000e(m), without requiring the heightened showing previously required for Title VII under *Price Waterhouse*.

In light of these clear statutory changes, the Court had little difficulty concluding that a Title VII plaintiff is not required to produce direct evidence to obtain a "mixed motive" instruction. *Desert Palace, Inc.*, 539 U.S. at 101-02.

Tellingly, Congress did not similarly modify the "because of" language in the ADEA. This clearly was not an oversight, given that Congress did amend a portion of the ADEA not relevant to this case in the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C. § 626(e)) (relating to statute of limitations under ADEA).

As a result, the Civil Rights Act of 1991 has no bearing on this case, and Justice O'Connor's controlling opinion in *Price Waterhouse* remains the authority on obtaining a "mixed motive" instruction under the ADEA. *See, e.g.*, *Mereish*, 359 F.3d at 339-40) (reciting Justice O'Connor's concurring opinion as the standard for the "mixed motive" framework in ADEA claims and expressing doubt that the Civil Rights Act of 1991 altered this approach). Indeed, as this Court previously recognized in the disparate impact context, because the 1991 amendments made to Title VII were not made to the ADEA, the ADEA continues to be construed in accordance with the Court's pre-1991 Title VII decisions. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005)

("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."). This reasoning in *Smith* is directly applicable here. If the ADEA is to be interpreted as if it had language analogous to 42 U.S.C. § 2000e-2(m), this should be done by Congress and not this Court. Congress' failure to amend this portion of the ADEA in the Civil Rights Act of 1991 is strong evidence that it intended to leave the ADEA as it was: subject to the holding of *Price Waterhouse* based on the concurring opinion of Justice O'Connor.

B. Congress' Decision to Amend Only Title VII and Not the ADEA is in Keeping with its Historical Preference to Treat Discrimination under Title VII and the ADEA Differently.

Since the ADEA's inception in 1967, only three years after Title VII's enactment, Congress has used different tools to combat age discrimination and discrimination based on traits protected by Title VII. Most evident is that when Congress decided to prohibit age discrimination, it did not simply amend Title VII. In fact, both the U.S. House of Representatives and the Senate struck down amendments that would have added age as a protected characteristic in the legislation that became Title VII. *See EEOC v. Wyoming*, 460 U.S. 226, 229 (1983), *superseded by statute*, Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3, 100 Stat. 3342, 3342 *as*

recognized in McCann v. City of Chicago, 968 F.2d 635, 636 (7th Cir. 1992). Rather, Congress created the ADEA, with significant structural differences from Title VII.

Among these key structural differences are the enforcement mechanisms of Title VII and the ADEA. Whereas a private Title VII suit may proceed as a class action under the familiar opt-out procedure of Federal Rule of Civil Procedure 23, *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) ("An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)." (*quoting Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 330 (1980))), Congress limited a plaintiff's ability to bring a class-type claim under the ADEA by incorporating the unique statutory opt-in procedure of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b) (stating that the provisions of the ADEA are to be enforced in accordance with the Fair Labor Standards Act); 29 U.S.C. § 216(b) (prescribing opt-in procedure for class-type claims, termed collective actions, brought under the Fair Labor Standards Act); *see also Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989) (noting that the ADEA incorporates the enforcement provisions of the FLSA and addressing an issue relating to opt-in collective actions under the ADEA). The two statutes also differ in available remedies. The ADEA, for example, allows for liquidated damages in the case of

willful violations but not for punitive or compensatory damages.[15] *See* 29 U.S.C. § 626(b).

Congress' policy choice to treat age discrimination differently than other types of employment discrimination is not surprising given that discrimination based on age differs from the types of discrimination prohibited by Title VII. As this Court has explained, "'age discrimination rarely was based on the sort of animus motivating some other forms of discrimination.'" *Hazen Paper Co.*, 507 U.S. at 610 (*quoting EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)). Rather, age discrimination "was based in large part on stereotypes," such as decreased productivity of older workers. *Id.* In addition, unlike other types of employment discrimination, age is often correlated with other factors, such as pay and years of service, making it especially critical to accurately discern and punish only discrimination on account of age, rather than discrimination based on pay, seniority, or other legitimate factors that may appear at first glance to be age-related. It is thus reasonable that Congress, in enacting the Civil Rights Act of 1991, chose to reduce the plaintiff's burden in Title VII cases, while choosing not to make corresponding changes to the ADEA.

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15 Coverage under the two statutes can also differ. *Compare, e.g.*, 42 U.S.C. § 2000e(b) (defining Title VII employer as having a minimum of fifteen employees) *with* 29 U.S.C. § 630(b) (defining ADEA employer as having a minimum of twenty employees).

III. IF THE COURT IS TO REVISIT ITS HOLDING IN *PRICE WATERHOUSE*, IT SHOULD HOLD THAT NO SPECIAL FRAMEWORK IS APPROPRIATE FOR "MIXED MOTIVE" CASES. THE *MCDONNELL DOUGLAS-BURDINE* FRAMEWORK IS ADEQUATE TO ADDRESS "MIXED MOTIVE" CASES AND MORE FAITHFUL TO THE PLAIN LANGUAGE OF THE ADEA THAN THE *PRICE WATERHOUSE* APPROACH.

As discussed previously, *see supra* Part I.B, limiting access to the "mixed motive" instruction to those plaintiffs who present direct evidence of discrimination (*i.e.*, the holding of the Court in *Price Waterhouse*), is a way to accommodate perceived competing interests while at the same time limiting the frequency of departure from the statutory text and default rules of civil litigation as to the burden of persuasion. That is, the direct evidence requirement serves the critical gate-keeping function of protecting a defendant from being saddled with a burden that is not properly his under the ADEA or the norms of civil litigation. While this may be one possible policy choice and is the minimum protection required for a defendant under the ADEA, it is not the approach most in harmony with the statutory text and civil litigation defaults. If the Court is to revisit its holding in *Price Waterhouse*, *amici* urge the Court to do away with the "mixed motive" instruction in the ADEA and allow all disparate treatment ADEA claims to be governed by the familiar and well-travelled *McDonnell Douglas–Burdine* framework.

No special analytical framework is required to adequately address multiple motive cases because

every case is a "mixed motive" case that can be properly decided under the *McDonnell Douglas–Burdine* framework.[16] Rarely will a trier of fact in a discrimination case be presented with only one potential motive (indeed, rarely will an employer's decision be influenced by only one motive). Once the employee presents a prima facie case of discrimination under the *McDonnell Douglas–Burdine* framework, an employer will almost always articulate one or more legitimate, nondiscriminatory reasons for the employment action in question. At that point, the trier of fact will be called upon to decide which of the offered explanations, either alone or in combination, was the cause of the challenged employment action.[17]

The articulation of a special evidentiary framework to govern "mixed motive" cases serves

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16 Petitioner's *amici* make this same point. *See* Brief of National Employment Lawyers Association as *Amicus Curiae* in Support of Petitioner at 15-19; Brief of American Association for Justice as Amicus Curiae in Support of Petitioner at 8-11. Rather than adhering to the *McDonnell Douglas–Burdine* framework, however, they seek to effect a legal coup by transplanting the changes made to Title VII by the Civil Rights Act of 1991 to the ADEA, although the ADEA was not similarly amended by Congress.

17 It is incorrect to assert, as Petitioner and some of his *amici* do, that the *McDonnell Douglas–Burdine* framework has nothing to do with causation. *See, e.g.*, Brief for Petitioner at 56; Brief of American Association for Justice as Amicus Curiae in Support of Petitioner at 4-5. The entire framework is built around shifting presumptions of causation aimed at resolving the ultimate question of intentional discrimination.

only to foster confusion. Courts will be called upon to preliminarily determine the critical factual issue as to whether the plaintiff has met the burden required to obtain a "mixed motive" instruction. If the court decides in the affirmative, the jury will be instructed as to the now-shifting burdens of persuasion, likely resulting in confusion for the jury. In all too many cases, the jury will make the undetectable and irremediable error of requiring the defendant to bear the entire burden of persuasion. More importantly, the "mixed motive" instruction departs from the statutory text of the ADEA, which requires but-for causation as an element of liability to be proved by the plaintiff in accordance with standard civil litigation default rules.[18] *See supra* Parts I.B.1, I.B.2. The *McDonnell Douglas–Burdine* framework allows for the consideration of multiple or "mixed" motives, while keeping the burden of persuasion properly on the plaintiff to prove the causation element of liability.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, made exactly this point in *Price Waterhouse*:[19]

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[18] It is primarily this reason that renders unworkable *amici* American Association for Justice's suggestion that every plaintiff asserting disparate treatment discrimination, whether under the ADEA or otherwise, should be permitted to choose the more beneficial "mixed motive" jury instruction codified in Title VII by the Civil Rights Act of 1991. *See* Brief of American Association for Justice as Amicus Curiae in Support of Petitioner at 14.

[19] The United States also agreed with this approach in its *amicus curiae* brief submitted to this Court during its consideration of *Price Waterhouse*. *See* Brief for the

> I would adhere to this established [*McDonnell Douglas–Burdine*] evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for "mixed-motives" cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

Price Waterhouse v. Hopkins, 490 U.S. 228, 287 (1989) (Kennedy, J., dissenting). Justice Kennedy noted that the confusion is likely to be greatest in cases brought under the ADEA. *Id.* at 292. *Amici* NFIB and SHRM agree with this approach and urge the Court to abandon the *Price Waterhouse* approach in favor of the single *McDonnell Douglas–Burdine* framework, which provides clear direction to lower courts, allows for consideration of multiple motives, and properly keeps the burden of persuasion on the employee alleging a violation of law.

United States as Amicus Curiae at Part I.C, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

CONCLUSION

Petitioner and his *amici* urge this Court to cast precedent aside and hold that direct evidence is not required to obtain a "mixed motive" instruction shifting the burden of proof to the defendant in an ADEA disparate treatment case. For the reasons previously described, the Court should decline this invitation and, at a minimum, hold that direct evidence is required to obtain a "mixed motive" instruction under the ADEA, thus affirming its holding in *Price Waterhouse* and the decision of the Eighth Circuit. If, however, the Court chooses to revisit *Price Waterhouse*, it should adopt the familiar *McDonnell Douglas–Burdine* framework to govern all cases alleging disparate treatment under the ADEA, including the present case. Short of following one of these two preferable approaches, the Court should make clear that any "mixed motive" instruction is to be reserved exclusively for those limited number of cases in which the trial court determines that no reasonable fact finder could conclude that age was not a substantial factor in the challenged employment action.

Respectfully submitted,

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March 4, 2009